BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	
Les Breitman, M.D. Physician's and Surgeon's Certificate No. A21592	Case No. 10-2008-189611
Petitioner	

ORDER DENYING PETITION FOR RECONSIDERATION

The Petition filed by Steven H. Zeigen, Esq., attorney for Les Breitman, M.D. for the reconsideration of the decision in the above-entitled matter having been read and considered by the Medical Board of California, is hereby denied.

This Decision remains effective at 5:00 p.m. on July 30, 2012.

IT IS SO ORDERED: July 30, 2012.

Shelton Duruisseau, Ph.D., Chair
Panel A

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
	)	MBC No. 10-2008-189611
Les Breitman, M.D.	)	
	)	
Physician's & Surgeon's Certificate No. G21592	)	**ORDER GRANTING STAY**
	)	
	)	(Gov't Code Section 11521)
	)	
Respondent	)	

Steven H. Zeigen, Esq. on behalf of respondent, Les Breitman, M.D., has filed a Petition for Reconsideration and a Request for Stay of execution of the Decision in this matter with an effective date of July 20, 2012.

Execution is stayed until July 30, 2012.

This stay is granted solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration.

DATED: July 17, 2012.

A. Renee Threadgill
Chief of Enforcement
Medical Board of California

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
Les Breitman, M.D.	)	Case No. 10-2008-189611
Physician's and Surgeon's Certificate No. A21592	)	
Respondent	)	

DECISION

The attached Corrected Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on July 20, 2012.

IT IS SO ORDERED June 20, 2012.

MEDICAL BOARD OF CALIFORNIA

By: Shelton Duruisseau
Shelton Duruisseau, Ph.D., Chair
Panel A

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Case No. 10-2008-189611
LES BREITMAN, M.D.,	OAH No. 2011031218
Physician's and Surgeon's Certificate No. A 21592	
Respondent.	

CORRECTED PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 27, 28, and 29, 2012, and on March 1 and 23, 2012, in San Diego, California.

Abraham M. Levy, Deputy Attorney General, Department of Justice, State of California, represented Complainant, the Executive Director of the Medical Board of California, Department of Consumer Affairs, State of California.

Steven H. Zeigen, Rosenberg, Shpall & Associates, represented Respondent, Les Breitman, M.D., who was present throughout the administrative hearing.

The matter was submitted on March 23, 2012.

The Proposed Decision was signed on April 16, 2012, and was forwarded to the Medical Board of California.

By application dated May 9, 2012, Valerie Moore, Staff Services Manager, Discipline Coordinator Unit, Medical Board of California, requested that certain corrections be made to the Proposed Decision. A copy of that letter was served on Deputy Attorney General Levy and a copy of that letter was served on Attorney Zeigen.

In accordance with California Code of Regulations, title 1, section 1048, each party had 10 days from the date of the letter to file written opposition. No opposition was filed to the application.. In accordance with section 1048, Presiding Administrative Law Judge Alan R. Alvord designated Administrative Law Judge Ahler to review and decide the application.

Administrative Law Judge Ahler determined that the application was appropriate, that the application sought technical and minor changes to the Proposed Decision, and that the application should be granted. In accordance with California Code of Regulations, title 1, section 1048, a copy of the notice and order of correction and this Corrected Proposed Decision is being served.

PRELIMINARY STATEMENT

Since 2002, Dr. Breitman has practiced anti-aging medicine and has provided patients with an alternative cancer treatment known as Insulin Potentiation Therapy (IPT).

The Accusation charged Dr. Breitman with gross negligence, repeated negligent acts, and the failure to maintain adequate records in his care and treatment of patient KF. The Accusation also charged Dr. Breitman with improper record keeping, false advertising, dishonesty, and general unprofessional conduct. Complainant produced KF's testimony and the expert testimony of two board-certified physicians to support the quality of care allegations. Dr. Breitman's Websites were introduced. Complainant seeks the revocation of Dr. Breitman's certificate.

Dr. Breitman offered testimony from staff and patients to support his contention that his treatment of KF was no different than the competent treatment he provided to other IPT patients. He produced testimony from an experienced IPT practitioner. Dr. Breitman denied committing any act of negligence; he offered no explanation for the absence of KF's records, whose chart was lost, other than to claim that KF may have stolen the records; he conceded that some information in his Website was problematic before it was revised; and he declared that he did not engage in any dishonest conduct. He argued that KF's testimony was unclear and less than convincing; that complainant's experts were unfamiliar with IPT protocols; and that their expert opinions were not well founded or believable. Respondent's counsel argued that this was a one patient case; that no quality of care violation was established; that Dr. Breitman was never a danger to the public; and no more than a public reprimand should be imposed.

The clear and convincing evidence established that cause exists to impose discipline and that the outright revocation of Dr. Breitman's certificate is required to protect the public.

FACTUAL FINDINGS

Les Breitman, M.D.

1. Dr. Breitman is 78 years old. He received a bachelor's degree from The Ohio State University in 1960. Dr. Breitman received a medical degree from the California College of Medicine at Irvine (now the University of California, Irvine, School of Medicine) in 1964. He completed an internship at Santa Monica Hospital in 1965. Dr. Breitman did not participate in a residency. Dr. Breitman attended, but did not complete, law school.

In 1965, Dr. Breitman opened a general medical practice in Sherman Oaks, California, where he remained for approximately 12 years. He became disillusioned with the practice of allopathic medicine. In December 1977, Dr. Breitman moved to the Pacific Northwest, where he lived until 1998. He provided medical-legal services for insurance companies and attorneys when living in the Pacific Northwest, although Dr. Breitman occasionally returned to Southern California to cover for vacationing physicians.

In 1998, Dr. Breitman returned to Southern California and resumed the active practice of medicine. After working in Los Angeles for two years, Dr. Breitman opened the Institute for Anti-Aging Medicine in San Marcos, California, in 2000.

In 2002, Dr. Breitman underwent approximately five days of IPT training in Phoenix, Arizona, and five days of training under Donato Perez Garcia, Jr., M.D., at Dr. Garcia's clinic in Tijuana, B.C., Mexico. Dr. Breitman then trained for approximately six days under Steve Ayre, M.D., a physician based in Chicago, Illinois, who was the first physician in the United States to practice IPT. Dr. Breitman practiced IPT with Dwight Brodie, M.D., "for several days" at Dr. Brodie's clinic in Reno, Nevada. Dr. Breitman then began practicing IPT by himself.

In 2002, Dr. Breitman founded Alternative Cancer Treatment Center of Southern California. He moved his clinic to Oceanside, California, where he continues his practice.

From 2001 through 2005, Dr. Breitman served on the Board of Directors of the American College for Advancement in Medicine (ACAM), a nonprofit organization dedicated to educating physicians and other health care professionals in the safe and effective application of integrative medicine. In 2006, Dr. Breitman was appointed to the Medical Advisory Board of the International IPTLD[1] Physicians.

Dr. Breitman has been an invited speaker at ACAM, the Los Angeles Trial Lawyers Association, the American Society of Facial Plastic and Cosmetic Surgery, and the Cancer Control Society meetings and events.

Dr. Breitman is not board certified in any medical specialty. His curriculum vitae does not indicate that he holds staff privileges at any hospital.

License History

2. On July 1, 1965, the Medical Board issued Physician's and Surgeon's Certificate No. A 21592 to Dr. Breitman. That certificate is current. There is no previous history of any disciplinary action having been brought against Dr. Breitman's certificate.

Insulin Potentiation Therapy (IPT)

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[1] The acronym IPTLD stands for Insulin Potentiation Targeted Low Dose Therapy.

3. According to Dr. Breitman, there are 36 physicians in the United States who provide insulin potentiation therapy, three of whom are also board certified oncologists.

Insulin potentiation therapy (IPT) involves the administration of intravenous insulin and low doses of chemotherapy drugs to treat cancer. IPT was developed in Mexico by Dr. Donato Perez Garcia, Sr. His practice has been carried on by his son and by his grandson, Dr. Donato Perez Garcia, Jr.

IPT proceeds on the theory that cancer cells have approximately 16 times more insulin and insulin-like receptors than normal cells. Through the intravenous administration of insulin, cancer cells are targeted and the effects of chemotherapy drugs delivered to cancer cells become magnified or potentiated. The amount of chemotherapy drugs used in IPT is 10 to 15 percent of the dose administered in traditional chemotherapy. This lower dose of chemotherapy drugs is thought to spare non-cancer cells from dose-related side effects. Proponents of IPT claim that the use of insulin enhances anticancer drug toxicity and safety because insulin differentiates between cancer and non-cancer cells, increases cancer cell metabolism and makes cancer cells more susceptible to chemotherapy drugs, and increases the membrane permeability of cancer cells which boosts the intracellular dose intensity of the chemotherapy drugs that are delivered.

In a most simple description, IPT consists of the following: (1) a small amount of Humalog (a rapid-acting insulin) is infused by drip intravenously into the patient; (2) after 20 to 40 minutes or so, the patient develops symptoms of mild hypoglycemia that may include hunger, thirst, drowsiness, mild sweat, increased body temperature, a faster heartbeat, and/or palpitations; and (3) at this "therapeutic moment" chemotherapy drug(s) are pushed intravenously, followed by the administration of intravenous glucose that arrests the patient's hypoglycemia. The patient must be under close observation during treatment. Finger sticks must be obtained to establish a baseline glucose reading before IPT treatment begins and finger sticks must be obtained during treatment to monitor the patient's glucose level. The total elapsed time required for an IPT treatment is usually less than 120 minutes.

Most of the information about IPT comes from anecdotal reports. There are no published scientific studies showing that IPT is safe or effective in treating cancer in humans other than a study done in Uruguay in 2004. The Uruguay study included 30 women who suffered from breast cancer that was resistant to mainstream therapies; of these women, 10 received insulin, 10 received the chemotherapy drug methotrexate, and 10 received IPT using both insulin and methotrexate. The Uruguay study found that the group "treated with insulin and methotrexate responded most frequently with stable disease" when compared to the women treated with methotrexate alone or insulin alone.

4. Dr. Breitman's Website currently contains the following disclaimer:

> IPT is not generally accepted by the traditional oncology community. There have been no truly scientific clinical studies that would confirm the effectiveness of IPT.

> However, there are numerous physicians in the world certified to perform IPT. They and numerous patients would attest to the value of IPT. Further study of this apparently remarkable theraphy [sic] is encouraged.

Patient KF

5. Patient KF was born in February 1955. She holds a bachelor's degree in athletic training. She is a licensed real estate salesperson. KF lives in San Diego.

In late 2006, KF noted a growth on her right forearm. KF's primary care physician referred KF to a dermatologist, who performed a biopsy in February 2007 that showed a malignant melanoma with positive margins. The dermatologist referred KF to a general surgeon, Dr. Jeffrey Mazin. In March 2007, KF underwent a further resection with an approximate 1 cm margins and sentinel lymph node biopsy. No further melanoma was identified in the margins, but two lymph nodes removed from the right axilla contained a few MART-1 cells[2] in clusters, resulting in a presumption that KF had a metastatic disease in the right axilla.

On March 30, 2007, KF was evaluated by Dr. Gregory Daniels, an oncologist. Following an examination and a record review, Dr. Daniels believed KF had "a stage III-A [cancer] given the lymph node involvement; however, we do not seem to have evidence that there is an H and E proof that this was involvement in melanoma in immunohistochemical stain." Dr. Daniels discussed treatment options with KF including observation, a lymphadenectomy, and the administration of interferon.[3] KF advised she was going to seek additional options. The potential side effects of interferon bothered KF.

In April 2007, KF was evaluated by Dr. Edward F. McClay, an oncologist, who diagnosed KF with stage IIIa melanoma that was a "microscopically only disease." Dr. McClay estimated that KF's risk of reoccurrence was somewhere between 20 to 30 percent. Dr. McClay requested that KF undergo a PET CT scan and he discussed with KF an adjuvant therapy involving high-dose interferon. Again, KF was bothered by the potential side effects of interferon.

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[2] The abnormal presence of the MART-1/Melan-A antigen is useful as a marker for melanomas with the caveat that the antigen is also normally found in benign birthmarks and moles.

[3] Traditional adjuvant (after surgery) treatment options for melanoma to prevent recurrence are very limited and include the administration of interferon-alfa2b (IFN). Treatment with IFN is lengthy and challenging. The two most common side effects of IFN are flu-like symptoms (fever, chills, muscle and joint aches) and fatigue. Other adverse side effects include nausea, vomiting, skin irritation at the injection site, dizziness, emotional problems, "pins and needles" feelings in the hands and feet, hair loss, decreased white blood cell production, changes in liver function, and changes in heart rhythm and blood pressure.

6. KF contacted her brother, a physician in New Mexico. Her physician-brother spoke with Dr. Breitman, who told the physician-brother about his IPT practice and Website. After speaking with her physician-brother, KF reviewed the information (then) contained in Dr. Breitman's Website, which claimed IPT was a "kinder and gentler chemotherapy" with "almost no side effects."

Dr. Breitman's (Then) Website

7. Dr. Breitman's (then) Website stated:

> Insulin Potentiation Therapy is a protocol for administering traditional chemotherapeutic drugs using Insulin to transport the chemotherapeutic drugs across the cell membrane into the cancer cells. A much lower dose of the highly toxic drugs is required, because IPT treatment targets only the cancer cells, sparing the good cells. The cancer cells get the chemotherapeutic drugs, not the normal cells. Therefore, the patient does not suffer the severe side effects so common with conventional chemotherapy – no hair loss, vomiting, or fever. The quality of life remains high during treatment.

With regard to the efficacy of IPT, the (then) Website stated:

> It does appear that the percentages for remission and survival are at least as good with conventional chemotherapy, and probably much better. IPT has been used successfully in foreign countries for over 70 years. It has only recently been used in the USA, and there are many happy patients who say that IPT is not only more effective than conventional chemotherapy, but also that it is certainly more comfortable than the suffering they experienced with regular chemotherapy.

KF reviewed a statement in the (then) Website that answered the question, "Are there side effects of IPT treatment?":

> Almost none. There is certainly no hair loss, no going home to shiver in bed for a day or two, and no severe vomiting. There is occasional constipation, which is easily controlled by simple medications. Some nausea is occasionally encountered for a few hours after the first couple of treatments, but this is also easily managed.

Another portion of the (then) Website stated:

> Unlike conventional chemotherapy, there have been no reported deaths as a result of IPT. In brief, there is no danger. The worst side effect encountered is easily managed constipation. Unlike conventional chemotherapy, anemia and decreased platelet counts are unusual and usually not so severe as to require transfusions.

KF's April 9, 2007, Meeting with Dr. Breitman

8. After reviewing the Website, KF met with Dr. Breitman on April 9, 2007, for 60 to 90 minutes. The consultation did not include a physical examination. During the meeting, Dr. Breitman explained the IPT treatment procedure and told KF that she would likely need to undergo approximately ten separate IPT treatments. Dr. Breitman told KF that she would not experience hair loss, that she could work during the treatment, and that there would be "no down time." He told KF that she might feel some fatigue, but it would go away if she rested. Dr. Breitman told KF that the cost of each treatment session would be $1,200, and that payment was required after each session. Dr. Breitman said his clinic did not accept payment from insurance companies, but arrangements for insurance payments might be possible through independent insurance billing services. KF found this information helpful in reaching the decision to treat with Dr. Breitman.

The information in the Website, Dr. Breitman's comments during the April 9, 2009, meeting, and KF's discussions with her physician-brother persuaded KF to obtain IPT from Dr. Breitman.

9. Dr. Breitman did not tell KR that she needed to obtain current baseline blood work or other diagnostic testing before her first treatment. KR did not tell Dr. Breitman that she would make arrangements for blood work and diagnostic testing through her physician-brother to save money. KR's testimony on these issues was credible. The medical records established that KR had Blue Cross insurance that paid for diagnostic testing. As KR testified, "I had insurance. I didn't need to save money."

10. KF provided Dr. Breitman with a March 3, 2007, laboratory report that contained the results of a complete blood count, a comprehensive metabolic panel, a routine urinalysis, and a lipid panel during the April 9, 2007, meeting. LabCorp San Diego had provided that report to Dr. Mazin and KF made a copy of it. KF was certain that her physician-brother did not order any laboratory testing for her before her first IPT treatment or during the course of her IPT treatment. KF's testimony in this regard was credible.

The Treatment with Dr. Breitman

11. KF's first treatment with Dr. Breitman occurred on April 19, 2009. A friend drove KF to Dr. Breitman's clinic. KF was nervous. After checking in, Dr. Breitman asked KF how she was doing. After speaking briefly with Dr. Breitman, KF was taken to the treatment area. Other patients were present and "all the chairs were filled."

An IV insulin drip was started. The nurse who started the drip told KF to let her know when KF experienced a "funny feeling," and that chemotherapy drugs would be administered at that time. Dr. Breitman came into the therapy area and greeted KF. He left and returned when KF experienced a "funny feeling."

KF could not recall how many times a finger stick was obtained to test her glucose level during this visit.

After KF had the "funny feeling," Dr. Breitman returned and chemotherapy drugs were administered intravenously. KF remained in the treatment area for one to two hours after that, then went to the front desk and paid her bill with a check. Another appointment was scheduled at the front desk. KF "felt good" when she left.

12. On April 24, 2007, a friend drove KF to the clinic. KF "felt like she was staring to get a cold." She felt achy and run down. KF met with Dr. Breitman and told him how she was feeling. Dr. Breitman told her to stay away from her boyfriend, take liquid zinc, and get plenty of rest. KF walked back to the treatment area.

In the treatment area, an IV insulin drip was started. Chemotherapy drugs were administered after KF experienced the "funny feeling." Dr. Breitman was present when the chemotherapy drugs were administered. KF could not recall the number of times she had a finger stick to test her glucose level. Following chemotherapy, KF remained in the treatment area, after which she went to the front desk and paid her bill with a check. The next IPT treatment was scheduled for April 27, 2007.

13. Between April 24 and 27, KF did not feel well; she felt run down, fatigued, and like she was getting a cold.

14. On April 27, 2007, KF was exhausted; she could not have driven herself to the clinic for the IPT treatment; she was driven to the clinic by a friend. KF met with Dr. Breitman before treatment began and advised him of her symptoms. Dr. Breitman told her, "Keep going, but take it easy." KF went to the treatment area.

In the treatment area, an IV insulin drip was started and IPT treatment followed the same course as before. KF was tired and did not feel well during treatment. Following the treatment, KF paid her bill and another IPT treatment was scheduled for May 1, 2007.

15. Between April 27 and May 1, 2007, KF felt progressively worse. She had a fever, was developing cold sores in her mouth, was achy and tired, and felt horrible.

16. On May 1, 2007, KF met with Dr. Breitman before treatment and told him about her symptoms. Dr. Breitman told KF that she should not worry and that she should undergo the treatment as scheduled. KF trusted Dr. Breitman and believed that he knew what he was doing. KF submitted to IPT treatment, which progressed as before. At the

conclusion of the treatment, KF paid her bill at the front desk and made an appointment for another treatment on May 8, 2007.

The Failure to Obtain Laboratory Data

17. In a letter to the Medical Board dated April 18, 2008, Dr. Breitman stated:

> In this particular kind of chemotherapy, we do obtain a baseline CBC to assure that the patient's immune system will tolerate the chemotherapy. In this particular case, my solid recollection is that the patent presented with such a CBC, recently performed by another lab. I recall that it was perfectly normal, so treatment was commenced. My recollection is that this patient was one of those who preferred to obtain her blood draws for lab studies at another facility – presumably because of insurance issues . . . .

The letter made no reference to KF's physician-brother.

18. Before the IPT treatment started on April 19, 2007, Dr. Breitman did not obtain and review comprehensive laboratory testing that was less than two weeks old. From April 10 through May 1, 2007, Dr. Breitman did not obtain additional comprehensive laboratory testing.

KF had medical insurance which would have paid for diagnostic testing had Dr. Breitman required her to undergo such testing. KF never asked her physician-brother to arrange for diagnostic testing, and KF never told Dr. Breitman that her physician-brother would make arrangements for additional laboratory studies.

KF's Interactions at the Clinic with Dr. Breitman and the Nurses

19. Dr. Breitman asked KF how she was feeling before each treatment session. On at least one occasion, May 1, 2007, KF told Dr. Breitman about some developing mouth sores. It was not clear whether Dr. Breitman heard KF's description of the mouth sores or whether he ignored or dismissed what he was told. He did not look into KF's mouth or conduct a physical examination

KF's vital signs were always taken before IPT treatments. Information was always entered into a patient chart that documented KF's symptoms and care. A nurse or other attendant was always present in the treatment area when insulin was infusing, when chemotherapy drugs were pushed [administered] IV, and when KF was recovering. KF could not recall the number of finger sticks obtained during each therapy session to test her glucose level. Dr. Breitman was always present when the chemotherapy drugs were pushed. He sat on a stool next to KF's recliner, observing what was taking place.

KF's Hospitalization

20. KF felt progressively worse after the May 1, 2007, treatment. KF felt so bad she tried to contact Dr. Breitman on his cell phone to advise him of her symptoms, which included chills and a fever. When KF was unable to get in touch with Dr. Breitman, a friend drove KF to UCSD Medical Center, where she was seen in the emergency room and was then admitted to the hospital.

21. UCSD medical staff unsuccessfully attempted to get in touch with Dr. Breitman. In some fashion, Stephen B. Howell, M.D., learned that KF received unknown doses of chemotherapy drugs including dacarbazine, cisplatin, and vincristine on April 19, 2007, and that unknown dosages of those drugs were administered again on April 27, April 29, and May 1, 2007. KF told Dr. Howell she had a 103 degree fever the day before her admission and headaches. She described the onset of mild mucositis[4] symptoms over the past three days and some paresthesia in the fingers and toes. KF told Dr. Howell she had not experienced any hair loss. According to Dr. Howell's notes, KF was an ill-appearing female with "pinpoint" pupils. Her temperature was 102.1. KF's oral mucosa was moist, there were no obvious ulcerated lesions, but there was some hyperemia (increase in blood flow) along the inner margin of the lower lip. Relevant laboratory data reflected a decreased white blood cell count.

Dr. Howell's admission note stated, "This woman presents now with severe neutropenia, most likely induced by her recent chemotherapy." KF was started on broad spectrum antibiotics. Dr. Howell's admitting diagnoses were neutropenic fever[5] and malignant melanoma, status post surgery status post chemotherapy. His plan was to obtain further information about her chemotherapy by contacting "her oncologist tomorrow."

During her hospitalization, KF's white blood cell count gradually increased. Symptomatically, KF improved and she did not have a fever on May 9, 2007, when it was determined that "She has now recovered from her neutropenic fever . . . . " KF remained in the hospital that night to ensure that her fever did not return. She was discharged from the hospital on May 10, 2007.

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[4] Mucositis is the inflammation and ulceration of the mucous membranes that line the digestive tract. Oral mucositis refers to an inflammation and ulceration that occurs in the mouth, a common complication of cancer treatment.

[5] Neutropenic fever (infection of the blood) is most often seen as a complication associated with chemotherapy, although neutropenic fever can be caused by other illnesses or conditions. Patients with neutropenic fever demonstrate an abnormally low white blood cell count. All cases of neutropenic fever are treated as urgent because patients can become very ill very quickly. Generally, patients with neutropenic fever will be started on wide spectrum antibiotics until the results of blood and microbiology tests have confirmed the exact nature of the infection. Once the cause of the fever has been identified, medication can be targeted more efficiently.

Typewritten records of physical examinations in the UCSD medical records refer to the presence of mouth sores. A handwritten history and physical dated May 6, 2007, states, "Also mentions mouth sores x one week" and "+ ulcerations inside the mouth." The initial progress note states in part, "Pt. reports sores in her mouth & HA [headaches]." That note also states, "OP [oral pharyngeal] few small ulcers."

Some hospital records suggested that KF's mouth sores were not present before admission. With regard to inconsistent hospital records, it is not uncommon for there to be some inconsistency in hospital and medical records, nor is it uncommon for different physicians to reach different findings on examination of the same patient at the same times.

On May 10, 2007, KF was discharged to home in stable condition. She was told to follow up with Dr. Daniels.

22. KF spoke by telephone with Dr. Breitman during her hospitalization. She told him that she was not going to have any further IPT treatment and asked him to provide her with her medical records. When KF spoke with Dr. Breitman, she was very angry.

23. KF suffered hair loss after she was discharged from the hospital. Her hair "came out in clumps." KF's hair ultimately grew back, but the hair that grew back was thicker and looked different than the hair that did not fall out.

24. KF met with Dr. Daniels after her discharge. A PET CT scan was negative. Dr. Daniels advised KF that she did not need further chemotherapy, but recommended that KF continue to be seen by an oncologist on a regular basis. KF now sees Dr. Daniels about once a year.

The Loss of the Patient Chart

25. KF wanted a record of her treatment with Dr. Breitman so she could provide that medical record to other treating physicians. Before August 7, 2007, KF asked a staff person at Dr. Breitman's clinic to give her a copy of her records. "The girl at the front desk" told KF that she "could not find them."

On August 7, 2007, and on September 27, 2007, KF sent letters to Dr. Breitman, requesting that he produce her medical records. On September 28, 2007, Dr. Breitman telephoned KF and told her that he and his office staff were unable to locate her records. He did not offer to recreate her chart.

KF's Consumer Complaint

26. On January 28, 2008, after serving Dr. Breitman with a 90-day notice of intent to sue, KF filed a consumer complaint with the Medical Board. KF stated she was seen by Dr. Breitman in consultation on April 9, 2007, and that he provided IPT treatment on April 19, 24, 27, and May 1, 2007. She wrote that Dr. Breitman's Website stated an IPT patient was not supposed to have any side effects from the IPT except for nausea, but she spent five to six days in the hospital with neutropenic fever. KF stated that she found out during her

hospitalization that her blood count should have been checked before each treatment. KF also complained that Dr. Breitman lost her medical records.

Medical Board Involvement

27. Medical Board personnel contacted Dr. Breitman after receiving KF's consumer complaint. On February 13, 2008, and on April 4, 2008, the Medical Board sent letters to Dr. Breitman, requesting that he produce KF's medical records.

28. On April 18, 2008, Dr. Breitman wrote to the Medical Board concerning the loss of KF's medical records and her treatment with him. With regard to the lost patient chart, Dr. Breitman's letter states in part:

> I did treat the above referenced patient with low-dose targeted chemotherapy with a bio-response modifier three or four times during the month of April 2007, to the best of my recollection. I say recollection because there is no chart! It has disappeared under mysterious circumstances.
>
> Not only my staff, but I myself, personally, have also searched every drawer and cabinet in my clinic, looking for that chart. It is the actual date/time of disappearance that is so mysterious to me. In all the years that I have practiced medicine, I have never lost a chart, ever. I enclose a signed Declaration with a Certification of No Records. I am not indicating by signing this form that no such records were created, only that they cannot be located, therefore [it is] impossible to comply with the request . . . .

29. With regard to other matters, Dr. Breitman's letter of April 18, 2008, states in part:

> I was . . . informed by the patient that she was hospitalized with a very low WBC count. I believe she said it was only 5000. But this is an acceptable side effect chemotherapy; it happens much more often with the conventional dose chemotherapy, but rarely with low doses that we administer. Low-dose chemotherapy requires that a CBC be ordered with less frequency, and whoever informed [KF] that blood counts should have been checked at every visit is likely unfamiliar with this form of treatment. Still, we are aware of the possibility, and we check for it

> routinely. When it does happen, there are medications . . . that are designed especially for this side effect . . . .
>
> . . . To the best of my recollection, this patient never called me to discuss her termination of treatment or any symptoms or difficulties she had in response to treatment.
>
> You state that the patient alleges that she learned from my web site that she was not supposed to suffer any side effects. My web site states no such thing! It is true that improved quality of life is a primary reason patients choose low-dose chemotherapy, but I discuss the potential side effects briefly on the web site and in detail with patients before commencing treatment. Further, all patients sign an informed consent and are given a copy of that informed consent form. It states that there are indeed side effects, but that I would treat them appropriately should they occur. As stated above, myelosupression is an accepted side effect of chemotherapy, and it is dealt with immediately when it occurs. The patient is well informed of this. . . .

Dr. Breitman's Interview

30. A Medical Board investigator, a Medical Board consultant, and a deputy attorney general interviewed Dr. Breitman on November 18, 2009. Dr. Breitman was represented by counsel.

Dr. Breitman recalled KF had a malignant melanoma on her arm and that he "treated her three or four times." (Ex. 34, p. 37.) KF's physician-brother contacted Dr. Breitman and "then she came in." (Ex. 34, p. 38.)

Dr. Breitman stated that he always obtained a CBC and a metabolic panel for a patient with malignant melanoma, and "we want to make sure an LDH [lactate dehydrogenase] test is also obtained." (Ex. 32, p. 47.) Dr. Breitman recalled ordering blood work after the second or third treatment. He recalled that KF said, "Don't draw it from me. My brother is a doctor, and I get it free from him." Dr. Breitman recalled that KF's initial lab work was ordered by KF's brother. (Ex. 32, p. 62.) Dr. Breitman recalled that KF never complained of mouth sores or other side effects. If she had made such a complaint, he would have ordered labs and discontinued treatment until the labs came back. (Ex. 32, p. 63.)

A glucose reading is always obtained before IPT treatment begins. (Ex. 32, pp. 48-49.) During treatment, patients are observed and finger sticks are obtained to determine the therapeutic moment. Finger sticks are obtained when there are beads of sweat on the patient's forehead. Giving one finger stick is "typical, sometimes there's multiple." The clinic is prepared to treat hypoglycemic shock, but Dr. Breitman had never seen a case of it. Glucose is put in the IV bag after the chemotherapy drugs are pushed, which "brings the patient's blood sugar back down to normal." (Ex. 32, pp. 51-52.)

Dr. Breitman said KF's "medical chart disappeared under mysterious circumstances." (Ex. 34, p. 39.) He received a call from the hospital, learned KF was hospitalized, and she asked for the medical record: "We went to look for it . . . . We couldn't find the record . . . . We looked in every patient chart, to see if it got folded in there. We have not been able to find that record. And the last time we knew of it being in the office was at the time she paid for her [last] visit . . . . We never saw her again, nor the medical record." (Ex. 34, p. 40.) Dr. Breitman never tried to recreate KF's chart because, "I felt that that would be spoliation of records, if I tried to make one up." (Ex. 32, p. 42.)

Dr. Breitman acknowledged that he maintained a Website over which he had final approval. (Ex., 32, p. 67.) The Website stated, in part, "[T]he patient does not suffer the severe side effects so common with conventional chemotherapy; no hair loss, vomiting or fevers." (Ex. 32, p. 72.) With regard to that statement, Dr. Breitman told those present, "That's my opinion." (Ex. 32, p. 73.) Dr. Breitman recalled that in his IPT practice, he had encountered two cases of mucositis, and that those cases occurred after at least a dozen treatments. (Ex. 32, p. 74.) With regard to hair loss, Dr. Breitman stated:

> "Okay. There are various degrees of hair loss. We have had some patients that have clumps of hair come out. If you want to call that hair loss, yes; but it grows back during treatment, so I don't call it hair loss." (Ex. 32, p. 75.)

The Clinic's Custom and Practice

31. Dr. Breitman has employed Cheryl Schulze, R.N., at his clinic since 2000.

Nurse Schulze established that the clinic's custom and practice was and is to obtain a baseline glucose reading with a finger stick and to conduct four to 10 finger sticks thereafter during the course of an IPT treatment. She testified that it usually takes 15 to 30 minutes for a patient to reach the therapeutic moment. Nurse Schulze closely watches the patient when the IV insulin drip is infusing, and she tells each patient raise his or her hand when the patient experiences sweating, heart palpitations, thirst, or vision changes. A nurse or other attendant is always present in the treatment room.

Nurse Schulze has never asked a patient if he or she had mouth sores.

Nurse Schulze was aware of only one instance in which a patient lost consciousness during the administration of insulin, and that patient did well after being revived.

Nurse Schulze testified it was the clinic's custom and practice in 2007 to obtain complete blood counts weekly and that a baseline lab usually was obtained a couple of weeks before a patient started IPT treatment. A metabolic panel was obtained every two weeks after IPT treatment commenced. LabCorp provided laboratory services in 2007, and Quest provided those services at the time of the hearing. If an immediate lab was required, it was obtained through Internist Lab.

32. Several patients testified about their experiences at the clinic. Some recalled that vital signs were obtained before each IPT treatment session and all recalled that glucose levels were monitored fairly regularly during treatment sessions, one patient specifically recalling as many as "three or four times." One patient recalled having to obtain a dozen CBCs over the course of 18 IPT treatments. These patients lacked actual knowledge of the clinic's customs and practices, and the testimony from these patients was not helpful in establishing the clinic's actual custom and practice regarding the obtaining of CBCs and other diagnostic testing before and during IPT treatment.

The Standard of Care, Negligence, and Gross Negligence[6]

33. The "standard of care" requires a medical professional to possess and exercise that level of knowledge and skill ordinarily possessed by other members in good standing in the practitioner's specialty. The standard of care must be established by expert testimony. The standard of care is often a function of custom and practice. The process of deriving a standard of care requires some evidence of an ascertainable practice.

Simple negligence is merely a departure from the standard of care. A legitimate difference of opinion does not establish negligence. Medicine is not a field of absolutes. A physician is not necessarily negligent simply because he or she chooses one medically accepted method of treatment and it turns out that another medically accepted method of treatment would have been a better choice.

With respect to alternative medical treatment, ordinary medical standards apply to the extent that adherence to those standards are required to ensure a competent medical practice. For example, even though IPT is an alternative form of cancer treatment, sound medical practice requires that a complete blood count be obtained before IPT treatment begins, that frequent glucose levels be obtained whenever insulin is administered during IPT treatment, and that adequate and accurate records of treatment be maintained.

Gross negligence involves an extreme departure from the standard of care.

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[6] Appellate cases summarizing these and other relevant legal principles are set forth in the Legal Conclusions.

The Expert Testimony

34. Complainant's Experts: Monica J. Stokes, M.D., received a medical degree from Meharry Medical College in 1983. She completed a one-year internship and a four-year residency in Obstetrics and Gynecology at the United States Naval Hospital in Oakland, California, while she was on active military duty. Dr. Stokes was honorably discharged from the United States Navy in 1988 with the rank of Lieutenant Commander. She became board certified in Obstetrics and Gynecology. In June 2001, Dr. Stokes completed a two-year program in Integrative Medicine at the University of Arizona, Tucson. She was certified by the American Board of Holistic Medicine in 2002. Dr. Stokes is currently an academic author and practices Integrative Medicine in San Francisco, where she has maintained a medical practice since 2001. She is a member of the Medical Board's expert medical review panel and is an approved practice monitor. Dr. Stokes does not practice IPT and has not treated a patient with a malignant melanoma. Her knowledge of IPT protocols is based on her research in this disciplinary matter. Dr. Stokes is familiar with sound medical practices in the fields of general medicine, obstetrics and gynecology, and integrative medicine.

35. Subhash Dhand, M.D., received a medical degree from Government Medical College in Amristar, India, in 1972. He completed a one-year rotating internship at Lawrence General Hospital in Lawrence, Massachusetts, and a one-year Internal Medicine internship at Albert Einstein School of Medicine in Bronx, New York. He completed a two-year residency in Internal Medicine at the University of Massachusetts School of Medicine in 1978, and a two-year fellowship in Medical Oncology at the University of Southern California School of Medicine in 1980. Dr. Dhand is a Clinical Instructor with the USC School of Medicine and is Chairman of the Department of Internal Medicine at Citrus Valley Medical Center in Covina, California. Dr. Dhand is board certified in both Internal Medicine and Medical Oncology. Dr. Dhand has not practiced IPT, but he is very familiar with the science and the standards of care that apply in the traditional treatment of cancer and internal medicine.

36. Respondent's Expert: Richard M. Linchitz, M.D., studied medicine at the University of Lausanne Medical School in Switzerland, and then received a medical degree from Cornell University Medical College in 1973. He completed an internship at Moffit Hospital in San Francisco in 1974 and a three-year residency in Psychiatry at the University of California, San Francisco, in 1977. Dr. Linchitz was board certified in Psychiatry in 1979 and in Pain Management in 1989. He was certified in Acupuncture, Anti-Aging Medicine, and Insulin Potentiation Therapy. He became certified as an IPT instructor in 2007. Dr. Linchitz is a member of the American Academy of Anti-Aging Medicine, Chairman of the Integrative Medicine Consortium, and a Board Member of the American College for Advancement of Medicine. He is currently Medical Director of the Linchitz Medicine Wellness Clinic in Glen Cove, New York. Dr. Linchitz has been involved actively in the treatment of cancer for the past 15 years and he has been actively involved in IPT for the last seven years.

Dr. Stokes's Testimony

37. Dr. Stokes reviewed many documents including KF's complaint, Dr. Breitman's April 2008 letter, KF's 2007 records of treatment at UCSD, Dr. Breitman's Website, Dr. Breitman's curriculum vitae, letters from Dr. Breitman's (then) attorney, and KF's medical records maintained by other health care providers. She listened to the CD of Dr. Breitman's Medical Board interview. In addition, Dr. Stokes reviewed *Treating Cancer with Insulin Potentiation Therapy*, a text written by Hauser and Hauser; visited various IPT Websites; read *The Design and the Demise of Cancer, Medical Hypotheses*, an abstract written by Ayer and Perez that appeared in PubMed; and reviewed multiple summaries of poster and meeting presentations prepared by the Garcia-Perez family. Dr. Stokes sent and received numerous emails to the NIH, NCI, NCCAM, and OCCAM[7] to determine whether there was "any specific pilot or other funded study in the pipe-line regarding IPT as it relates to cancer therapy" - she was unable to find anything after a 2005 NCI-Alternative and Complementary Medicine Annual report mentioning Dr. Ayre. She found that IPT was also mentioned in OCCAM's spring 2009 newsletter.

38. Dr. Stokes was asked to assume that the only diagnostic testing that Dr. Breitman reviewed before initiating IPT treatment for KF on April 19, 2007, was the March 3, 2007, LabCorp report that contained the results of a complete blood count, metabolic panel, routine urinalysis, and lipid panel. (Factual Finding 10.)

Dr. Stokes testified that the LabCorp report was not recent enough to provide Dr. Breitman with sufficient information to reach sound medical decisions, and that the standard of care required Dr. Breitman to review diagnostic testing that had been obtained no more than a week before meeting with KF. Dr. Stokes believed that Dr. Breitman's failure to obtain and review a current lab report involved gross negligence.

39. Dr. Stokes opined that the administration of insulin to KF, who was not diabetic, was appropriate under the circumstances of the IPT treatment, but that doing so required frequent glucose testing. Dr. Stokes could not determine the frequency of such testing and she offered no opinion on the issue of whether the monitoring of KF's glucose level during IPT treatments involved any departure from the standard of care.

40. Based on her review of the medical records, Dr. Stokes believed that KF had mouth sores on at least her last visit to Dr. Breitman's clinic. The presence of mouth sores or hyperemia in the mouth indicate that a patient is having an adverse reaction to chemotherapy, and mucositis and hyperemia can result in a very serious medical condition. The presence of mucositis or hyperemia contraindicates the provision of chemotherapy drugs, even in low doses. Dr. Stokes assumed that KF complained to Dr. Breitman of the mouth sores and that he heard her complaint.

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[7] The acronyms stand for the National Institutes of Health, the National Cancer Institute, the National Center for Complementary and Alternative Medicine, and the Office of Cancer Complementary and Alternative Medicine.

Dr. Stokes opined that Dr. Breitman's administration of low-dose chemotherapy drugs to KF after she complained of mouth sores involved an extreme departure from the standard of care.

41. Dr. Stokes opined that Dr. Breitman's loss of KF's medical chart was an extreme departure from the standard of care, and that his delayed response when he was asked by the patient and Medical Board to provide the patient's chart "was very troubling." According to Dr. Stokes, "Charts just don't walk off on their own . . . . something just is not right."

Dr. Stokes testified that whenever a medical record is lost, a physician must, to the best of his or her ability, recreate the record with an appropriate notation concerning what happened and what has been recreated. The new record is not the same as a contemporary record. The failure to recreate a chart note or a medical record involved an extreme departure from the standard of care.

42. Dr. Stokes opined that Dr. Breitman's Website was inaccurate, certainly insofar as it claimed "no hair loss." Dr. Stokes believed that several other broad claims in the Website inaccurately minimized the side of effects of IPT, such as the claim that the worst side effect was easily managed constipation. There is also a risk of hair loss and serious fever, as was proven by this case. Dr. Stokes also believed that Dr. Breitman's Website "demonized" conventional cancer therapy, was unbalanced, and "this cannot be accidental."

43. Dr. Stokes admitted on cross-examination that she had not practiced IPT, that she was not a member of the IPT Advisory Board, that she was not aware that KF's brother was a physician, that KF did not experience hair loss while undergoing IPT treatments, that KF did not vomit when she was undergoing IPT treatments, that there was conflicting evidence in the UCSD medical records concerning the development of KF's mucositis, and that administering chemotherapy drugs to a patient with mouth sores and fatigue is heavily influenced if not actually determined by what the patient tells the treating physician.

Dr. Dhand's Testimony

44. Dr. Dhand reviewed many documents including the investigative report, KF's complaint, Dr. Breitman's April 2008 letter, KF's 2007 records of treatment from UCSD, Dr. Breitman's Website, letters from Dr. Breitman's (then) attorney, Dr. Breitman's curriculum vitae, and KF's medical records maintained by other health care providers. He listened to the CD of Dr. Breitman's interview.

Dr. Dhand disagreed with the scientific claims made by IPT proponents, but he believed that there was room for professional disagreement within the medical community and that a patient has the right to choose between conventional chemotherapy, IPT, and other alternative cancer treatments so long as the patient is adequately informed.

45. Dr. Dhand testified that the standard of care in administering chemotherapy drugs requires that appropriate laboratory testing, including a CBC, be obtained within two or three days of initiating chemotherapy, and that relying on laboratory data that is more than a month old, as he believed happened in KF's treatment, violated the standard of care.

46. Dr. Dhand testified that the standard of care requires that repeat laboratory testing, including CBCs, be obtained at least weekly when any chemotherapy is provided to a patient, and that laboratory testing should be obtained immediately if a patient complains of mouth sores, fever, aches, or not feeling well. The failure to obtain laboratory testing on a weekly basis during chemotherapy and the failure to obtain laboratory data when a patient's symptoms require doing so involves conduct falling below the standard of care. The provision of chemotherapy without required laboratory testing involved an extreme departure from the standard of care.

47. Dr. Dhand opined that if glucose testing during IPT was limited to obtaining a baseline finger stick and one additional finger stick before the therapeutic moment 20 to 30 minutes after insulin was begun, the patient would be at a great risk of injury and the failure to obtain more frequent glucose testing would violate the standard of care.

48. Dr. Dhand believed it was "theoretically" possible for a physician to lose a patient's medical record, but he believed that other records would exist, such as billing records, lab reports, diagnostic requests, day sheets, etc., that would enable the physician to reconstruct the patient's chart from those records and the physician's memory. When lost records need to be reconstructed, the standard of care requires that the reconstruction occur as soon as possible. The failure to maintain medical records and the failure to reconstruct medical records involved a simple departure from the standard of care even though no patient harm resulted from the absence of records.

49. Dr. Dhand testified that the standard of care requires that information and representations in a physician's Website be truthful, backed by scientific data, and easily understood. Dr. Dhand believed that Dr. Breitman's Website was misleading because it suggested that IPT therapy was just as effective as conventional chemotherapy when that was not scientifically proven and because IPT therapy had several side effects, including hair loss and neutropenia, that were minimized. Dr. Dhand believed that the misrepresentations in Dr. Breitman's Website, taken as a whole, involved gross negligence.

Dr. Linchitz's Testimony

50. Dr. Linchitz reviewed various materials including the UCLA pathology report related to KF's melanoma, a transcript of Dr. Breitman's Medical Board interview, and Dr. Stokes' and Dr. Dhand's reports.

51. Dr. Linchitz explained the science underlying IPT. He believed that Dr. Breitman's decision to treat KF's condition with IPT was entirely appropriate; he believed that IPT treatment was more effective than treating her with interferon. These matters were not raised in the Accusation as involving conduct falling below the standard of care.

52. Dr. Linchitz saw "nothing to document that [KF] had mouth sores" when she was being treated by Dr. Breitman, and, even if that were the case, it was not necessarily below the standard of care for Dr. Breitman to have provided IPT treatment if KF had mouth sores or a fever. Dr. Linchitz also believed that Dr. Breitman's prophylactic use of diflucan, a medication used to treat fungal infections, was appropriate and that its administration did not suggest the presence of mouth sores.

Dr. Linchitz testified that the standard of care in IPT requires that blood work be obtained within a week of commencing IPT treatment, and that blood work should be obtained every other session following the patient's first IPT treatment session.

53. Dr. Linchitz testified that the standard of care in IPT requires obtaining a baseline glucose test and a glucose test about 15 minutes thereafter, and that a glucose test can be administered every five minutes after that "depending on the patient." Administering insulin to a patient without appropriate glucose monitoring can be quite dangerous.

54. The loss of a patient chart is, according to Dr. Linchitz, "sometimes unavoidable." Dr. Linchitz did not believe Dr. Breitman's inadvertent loss of KF's chart involved conduct falling below the standard of care because no patient harm was established.

55. Dr. Linchitz reviewed Dr. Breitman's Website before revisions were made to it. He believed that the Website contained a few inaccuracies because some representations were so absolute. He believed that some of the representations in the Website were overly enthusiastic. Dr. Linchitz did not conclude, however, that the Website was "dishonest."

56. Dr. Linchitz was not paid for his expert testimony in this matter. He has known Dr. Breitman for seven years, and he believes Dr. Breitman is an honest practitioner. Dr. Linchitz believed this disciplinary action provided him with the opportunity to defend IPT. While Dr. Linchitz believed there was scientific data that supported the therapeutic principles of IPT, he acknowledged that there was no a double-blind, placebo-controlled scientific study confirming the efficacy of IPT.

Dr. Breitman's Testimony

57. About 75 to 80 percent of Dr. Breitman's current medical practice involves IPT. The remaining portion of his practice is related to hormone therapy and detoxification. Dr. Breitman estimated that he has provided IPT to about 1,000 patients. Most of the IPT patients he treats have failed traditional chemotherapy. He sees about one or two new IPT patients a week.

Dr. Breitman explained the science underlying IPT, his training with the founders and leading experts in IPT, and his certification to train others. Dr. Breitman described the protocol he follows at his clinic when administering insulin and low dose chemotherapy.

58. Dr. Breitman recalled meeting KF in April 2007. KF had a malignant melanoma on her arm. After reviewing KF's medical records, including a pathology report, Dr. Breitman concluded the "tumor remained in her body . . . and we knew it had spread." Dr. Breitman spoke with KF's brother, a physician, who knew his sister's case "was dire."

When Dr. Breitman met with KF, he told her that he had reviewed her medical records and that the administration of interferon was the conventional treatment for her condition. Dr. Breitman explained IPT and the side effects associated with IPT. He told KF that she might need 18 to 22 treatments, but the course of treatment would be reevaluated after six weeks. Dr. Breitman recalled that KF "chose to go with it."

Dr. Breitman said KF provided him with laboratory testing from LabCorp, but he testified "it was too old" for his use. Dr. Breitman testified that KF obtained a "fresh lab" before IPT treatment began. Dr. Breitman's testimony in this regard was untrue.

Dr. Breitman said KF did not want him to draw blood for testing after treatment started, and that she would obtain her own laboratory testing (which was agreeable to Dr. Breitman). Dr. Breitman testified that he would not have treated KF if she had not provided him with appropriate laboratory testing. Dr. Breitman said it was his practice to look at the patient's vital signs if the patient reported a fever, and that he obtained STAT testing if that was indicated by the patient's symptoms. Dr. Breitman testified that IPT protocol did not require blood work be obtained and reviewed before every treatment.

Dr. Breitman said he told KF, as he tells all patients, that possible side effects of IPT might include fatigue, hair loss, vomiting, and mouth sores. Dr. Breitman said he directed KF to tell him about any side effects before IPT treatments. Dr. Breitman testified that hyperemia was not the same as mouth sores, and that if a patient told him that he or she had mouth sores, he would not permit that patient to undergo further treatment until the sores had healed. Dr. Breitman testified that only two of his patients had ever complained of mouth sores, and that KF was not one of them. Dr. Breitman believed that KF had mouth sores when she was admitted at UCSD and that those mouth sores were likely due to IPT.

Dr. Breitman agreed that it would have been below the standard of care for him to have provided chemotherapy to KF if he knew that KF had mouth sores. Dr. Breitman agreed that only checking a patient's glucose level before initiating IPT treatment and just before the therapeutic moment involved conduct falling below the standard of care, that more frequent testing was required. Dr. Breitman said it was his clinic's custom and practice to conduct more frequent glucose testing, and that at least four finger sticks were obtained between the baseline and the therapeutic moment.

Dr. Breitman said KF called him from the hospital and was quite upset. When Dr. Breitman asked her why she had been hospitalized, KF said she had experienced severe side effects and she wanted her medical records. Dr. Breitman told her he would provide them. Dr. Breitman did not speak with KF again during her hospitalization. KF wrote two letters to Dr. Breitman, asking him to produce her medical records after she was released from the hospital, but she never asked him to recreate the medical chart.

59. Dr. Breitman testified that he modified his Website after this disciplinary hearing commenced. He said he did not intent to mislead anyone, and that the information in the Website was based on his personal beliefs and the beliefs of other knowledgeable persons. Dr. Breitman said that his Website was created in 2004 or so, and that he consulted with other IPT practitioners and borrowed information from their Websites to create his own Website. He testified that he was unaware of any patient having suffered any hair loss when he created the Website, and that he did not change his Website after he learned that two patients had experienced some hair loss. Dr. Breitman stated that he was not aware of any patient being hospitalized as a result of undergoing IPT treatments before KF's hospitalization, and that he was not aware of any patient deaths. Dr. Breitman said he decided to "change the Website to please the Medical Board."

60. Dr. Breitman presented himself as a highly trained, extremely knowledgeable, and very enthusiastic IPT practitioner. He provided long, rambling answers, often in response to questions that were not asked. Dr. Breitman attempted to portray himself as being very open and honest and as having an excellent memory.

Dr. Breitman's response about the truth of the Website's representation that there was no hair loss during IPT spoke volumes about his candor. When he was asked about this representation at his interview, Dr. Breitman responded, "Okay. There are various degrees of hair loss. We have had some patients that have clumps of hair come out. If you want to call that hair loss, yes; but it grows back during treatment, so I don't call it hair loss."

Dr. Breitman's failure to modify his Website when new information became known to him was very disturbing. Dr. Breitman referred others, including KF's brother-physician, to the Website for the purpose of obtaining information concerning IPT.

Despite the fact that KF and two other patients suffered hair loss, and notwithstanding the fact that KF was hospitalized for nearly a week as a result of a serious fever, the Website continued to represent that "There is certainly no hair loss, no going home to shiver in bed for a day or two . . . . The worst side effect encountered is easily managed constipation."

Dr. Breitman's Website did not refer to fatigue, hair loss, vomiting, and mouth sores, several side effects he claimed he told all of his patients about, including KF, when they met with him in person. The representations in the Website minimized or failed to mention IPT's side effects and, in some instances, the representations were simply untrue. Dr. Breitman did nothing to remedy the falsehoods until he was in the midst of a disciplinary hearing.

Dr. Breitman's testimony was often disingenuous and evasive. In the same manner he quibbled over what constituted "hair loss" and permitted erroneous information to remain in his Website, Dr. Breitman ignored evidence and shaded the truth in his testimony. His bias was evident.

Dr. Breitman was not a credible witness.

Factual Conclusions Concerning Issues Raised by the Accusation

Negligence

61. The clear and convincing evidence established that Dr. Breitman did not order and laboratory testing was not obtained within two weeks of KF's first IPT treatment on April 19, 2009. This omission involved gross negligence.

KF's testimony about her production of the LabCorp report and her testimony that she did not submit to other laboratory testing during her IPT treatment with Dr. Breitman was credible. Dr. Breitman's testimony that he reviewed a "fresh lab" before initiating IPT treatment was either the product of a faulty recollection, wishful thinking, or an intent to deceive.

62. The clear and convincing evidence did not establish inadequate glucose testing during IPT treatments. KF's testimony did not establish the actual extent of the glucose testing or the lack of such testing. Nurse Schulze's testimony on the issue of the clinic's custom and practice negated any finding of inadequate glucose testing.

63. The clear and convincing evidence established that KF was developing or had developed mouth sores by the May 1, 2007, visit. According to Dr. Breitman, the presence of mouth sores was an important matter because he would not have permitted KF to undergo further IPT treatment until those sores resolved.

It was not established that Dr. Breitman heard KF complain about mouth sores. The medical chart would have been the best evidence of what he was told. It was lost. The expert testimony did not support a finding that Dr. Breitman's examination of KF's mouth was required in the absence of his hearing a complaint about mouth sores.

The record does not support a finding of negligence on this issue.

The Lost Medical Record

64. Business and Professions Code section 2266 requires a physician to maintain adequate and accurate medical records. The expert testimony established that the standard of care requires that missing or lost medical records be reconstructed at the earliest opportunity, and that reconstructed records reflect the fact and the date of the reconstruction.

65. Dr. Breitman knew during KF's hospitalization that she wanted him to provide her with a copy of her medical records. Dr. Breitman had the duty at that time to locate and produce KF's medical records, or to advise KF that her medical records were lost and that he would reconstruct her chart to the best of his ability in a timely manner.

Dr. Breitman's failure to reconstruct KF's medical records at the earliest opportunity involved conduct falling below the standard of care. Dr. Breitman's irresponsible conduct was aggravated when he did not respond to KF's first written request for records and when

he did not respond at all to the Medical Board's first written request for production of KF's records.

Doing absolutely nothing under the circumstances involved simple negligence. That no harm resulted from Dr. Breitman's misconduct was irrelevant; the lack of patient harm did not transform Dr. Breitman's negligent behavior into the kind of conduct a reasonable and prudent physician would provide under the same or similar circumstances.

66. What happened to KF's medical record is uncertain. It is highly unlikely that KF took her medical chart from the clinic, as Dr. Breitman speculated. Why would she take her medical chart during IPT treatments? If she had done so, why would she later ask Dr. Breitman to produce the chart? The reference in the UCSD hospital records to the drugs that were administered at the clinic did not, as respondent's counsel suggested, establish that KF stole her own chart. Information was available from many other sources besides KF's chart.

Dr. Breitman intentionally concealed or destroyed KF's chart after he learned that KF had been admitted to the hospital because he knew that the chart contained unfavorable information, for example the absence of diagnostic testing before IPT began or the existence of a chart note related to mouth sores. This misconduct was not alleged in the Accusation as constituting dishonesty, but this finding relates directly upon Dr. Breitman's credibility.[8]

Almost as concerning as the loss of KF's chart was Dr. Breitman's refusal to recreate the chart after KF and the Medical Board requested its production. Dr. Breitman's assertion that recreating her chart would involve "spoliation of evidence" was fanciful and nearly as farfetched as his claim that KF "stole the chart."[9]

The Website – False and Misleading Advertising

67. The effective diagnosis, care and treatment of persons diagnosed with cancer is of paramount public importance. The causes of cancer and its effective treatment continue to baffle the medical and scientific community. For an individual diagnosed with cancer, the choice of treatment is one of the most important decisions he or she can make. Conventional cancer treatment includes surgery, radiation, and chemotherapy. There are well known painful and debilitating side effects associated with each of these therapies, and the outcome of cancer treatment is always uncertain.

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[8] *Thor v. Boska* (1974) 38 Cal.App.3d 558, 565-566, held that a physician's inability to produce his original clinical record concerning his treatment of a patient after he had been charged with malpractice created a strong inference of consciousness of guilt on his part.

[9] Where a party fails to produce evidence that would naturally have been produced, he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse. (*Williamson v. Superior Court* (1978) 21 Cal.3d 829, 836, fn.2.)

Medicine is a constantly evolving science. The National Institute of Medicine has reported that it can take up to 17 years for a new best practice to reach the average physician and surgeon. Physicians have an ethical obligation to share medical advances. What is unimagined today may be common medical practice tomorrow.

A person diagnosed with cancer has the right to chose an alternative treatment so long as a good-faith prior examination is performed and a medical indication exists for such treatment; the physician provides information concerning conventional treatment and explains why he or she is qualified to provide alternative treatment; the information provided does not discourage the patient from seeking a traditional diagnosis; and the alternative treatment provided does not cause death or serious bodily injury.[10] An adult patient of sound mind has the right to determine whether or not to submit to lawful medical treatment. The patient's consent to treatment, to be effective, must be informed. In soliciting the patient's consent to a particular kind of treatment, a physician has a fiduciary duty to disclose all information material to the patient's decision. [11]

The providing of information regarding promising new medical developments and therapies must be balanced and factual so that vulnerable patients are not deceived or harmed in reaching a treatment decision. A physician must explain the likelihood of success and the risks in agreeing to a treatment in language that a patient can understand, including any risk that a reasonable person would consider important in deciding to undergo the proposed treatment and any other information skilled practitioners would disclose to the patient under the same or similar circumstances.[12]

Persons diagnosed with chronic diseases, such as cancer, are often the targets of misleading advertising because they are frightened, in pain, or desperate for relief. They are susceptible to advertising that promises quick, painless cures or results, that misrepresents the science supporting the therapy that is being promoted, or advertising that contains testimonials or anecdotes from patients who have had positive but not necessarily typical results. Misleading advertising may include claims about the safety, success rates, and value of an alternative therapy that have absolutely no scientific basis. Misleading advertising may demonize more traditional or conventional therapies.[13]

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10 Business and Professions Code section 2234.1.

11 *Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 338-339.

12 California Civil Jury Instructions (BAJI) No. 6.11 sets forth the informed consent jury instruction in full.

13 Where advertising is aimed at a particularly susceptible audience, its truthfulness must be measured by the impact it will likely have on members of that group, not others to whom it was not primarily directed. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 506.)

A physician's dissemination of misleading advertising constitutes unprofessional conduct.[14] The key issue is whether advertising, regardless of format or content, is true and not materially misleading. It cannot reasonably be claimed that it is ethical to disseminate public advertising that is untrue or materially misleading.

68. Dr. Breitman established a Website for several reasons, one of which was to inform patients about the risks and benefits of IPT and another of which was to attract new patients to his practice.

Dr. Breitman's Website contained scientifically and medically unproven claims, such as "the percentages for remission and survival are at least as good as with conventional chemotherapy, and probably much better" and several claims that were untrue, such as IPT involved almost no side effects, "There is certainly no hair loss, no going home to shiver in bed for a day or two . . . . " and "The patient can easily continue with normal daily activities, enjoying a high quality of life while avoiding severe vomiting, hair loss, or fevers."

As Dr. Breitman conceded in his most recent Website, "There have been no truly scientific clinical studies that would confirm the effectiveness of IPT." With regard to claims about hair loss or fevers, KF's experience after IPT with Dr. Breitman established that the Website's factual claims were simply not true; KF was hospitalized for a fever and lost hair as a result of undergoing IPT; nevertheless, Dr. Breitman continued to represent in his Website that there was no hair loss or fevers with IPT until midway through the disciplinary hearing.

Persons reviewing the contents of Dr. Breitman's Website were likely to believe that the side effects of IPT did not include hair loss or fever, and that the chances of no remission and survival with IPT were at least as good with IPT as with conventional chemotherapy, if not better. Dr. Breitman's enthusiastic belief in IPT was not a defense to the charges of false advertising. Dr. Breitman should have known before he treated KF that IPT side effects included hair loss and fever, and he certainly knew of those side effects after treating her. Dr. Breitman always knew that no scientific study determined that treatment of with IPT was as effective as or better than traditional cancer treatment.

69. Dr. Breitman's Website intentionally preyed on the fears and anxieties of cancer patients. Through his Website, Dr. Breitman falsely offered a therapy with "virtually no side effects" and an outcome that that was represented to be as good as or better than obtained through conventional chemotherapy. These matters were false or misleading.

All of the experts believed that the false and misleading representations contained in Dr. Breitman's Website involved a departure from the standard of care. Dr. Stokes and Dr. Dhand believed the departure involved gross negligence. Dr. Linchitz believed that some of

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[14] Business and Professions Code section 2271 states: "Any advertising in violation of Section 17500, relating to false or misleading advertising, constitutes unprofessional conduct."

the representations were overly enthusiastic. Dr. Stokes's and Dr. Dhand's opinions concerning the extent of Dr. Breitman's departure from the standard of care in his Internet advertising were far more credible that Dr. Linchitz's opinion.

Dishonesty or Corruption

70. The Accusation alleges that Dr. Breitman's false and misleading advertising involved dishonesty or corruption (Paragraphs 30 and 31).

Dr. Breitman failed to change his Website after he learned that KF was hospitalized for fever as a result of her IPT treatment and after Dr. Breitman learned that other patients lost hair in clumps as a result of IPT treatment. Dr. Breitman learned during his interview that Medical Board representatives were critical of the representations in the Website. The clear and convincing evidence established that Dr. Breitman's behavior in maintaining a Website that contained false and misleading representations involved dishonesty. Dr. Breitman did nothing to correct his Website until he was in the midst of a disciplinary hearing. The misrepresentations and, more importantly, Dr. Breitman's failure to make prompt necessary changes to his Website established an absence of integrity, deception, and dishonesty.

General Unprofessional Conduct

71. The Accusation alleges that Dr. Breitman's care of KF and his false advertising involved general unprofessional conduct (Paragraphs 32 and 33).

If a physician decides to advertise his professional services, the advertising must be true and not materially misleading. Dr. Breitman's failed to change his Website after he learned that KF had been hospitalized for fever due to IPT treatment and after Dr. Breitman learned that some patients lost hair due to IPT treatment. Dr. Breitman's failure to change his Website when he learned of these matters and after he was notified by the Medical Board that the Website contained inappropriate representations was unethical and involved general unprofessional conduct.

Disciplinary Guidelines

72. The Medical Board's preface to its current disciplinary guidelines states in part:

> Business and Professions Code section 2229 mandates protection of the public shall be the highest priority for the Medical Board and for the Administrative Law Judges of the Medical Quality Hearing Panel. Section 2229 further specifies that, to the extent not inconsistent with public protection, disciplinary actions shall be calculated to aid in the rehabilitation of licensees. To implement the mandates of section 2229, the Board has

> adopted the Manual of Model Disciplinary Orders and Disciplinary Guidelines (guidelines), 10th Edition. Consistent with the mandates of section 2229, these guidelines set forth the discipline the Board finds appropriate and necessary for the identified violations. In addition to protecting the public and, where not inconsistent, rehabilitating the licensee, the Board finds that imposition of the discipline set forth in the guidelines will promote uniformity, certainty and fairness, and deterrence, and, in turn, further public protection.
>
> The Board expects that, absent mitigating or other appropriate circumstances such as early acceptance of responsibility and demonstrated willingness to undertake Board-ordered rehabilitation, Administrative Law Judges hearing cases on behalf of the Board and proposed settlements submitted to the Board will follow the guidelines, including those imposing suspensions. Any proposed decision or settlement that departs from the disciplinary guidelines shall identify the departures and the facts supporting the departure.

73. The clear and convincing evidence established that Dr. Breitman engaged in gross negligence, repeated acts of negligence, dishonesty, general unprofessional conduct, and that he failed to maintain accurate and adequate medical records. For these offenses, the disciplinary guidelines recommend:

> Maximum penalty: Revocation
>
> Minimum penalty: Stayed revocation, five years probation.

Disciplinary Arguments

74. Complainant observed that this disciplinary matter did not involve the efficacy of IPT, but, instead, involved Dr. Breitman's care of KF and the misrepresentations that were set forth in his Website. KF sought Dr. Breitman's professional services because she did not want to experience hair loss or other side effects of traditional chemotherapy. Maintaining a Website that claimed there was no hair loss and almost no other side effects with IPT, and that IPT was just as effective as traditional chemotherapy, involved gross negligence and dishonesty. Complainant asserted that Dr. Breitman's failure to obtain current laboratory testing before KF began IPT and his failure to obtain other lab reports during IPT involved gross negligence. Complainant claimed that there was inadequate glucose testing during IPT treatment. Complainant suggested that Dr. Breitman "lost" KF's records after he learned she might sue and that he failed to reconstruct her chart.

Dr. Breitman blamed KF for stealing his chart without any evidence to support that claim. Dr. Breitman was defiant in the face of valid criticism concerning the truthfulness of the representations in his Website, and did not change his Website until he was in the midst of the disciplinary hearing. Complainant concluded that public protection required an outright revocation of Dr. Breitman's certificate because he expressed no remorse, did not admit any wrongdoing, and lacked the capacity for rehabilitation. According to complainant, these circumstances make Dr. Breitman a very poor risk if he were to be placed on probation.

75. Respondent's counsel argued that KF experienced rare and unexpected side effects from IPT, but that Dr. Breitman did not provide any treatment with the knowledge that KF had mouth sores. Respondent's counsel argued that the notations in the UCSD hospital records that set forth the drugs that were administered to KF during IPT could only have come from KF's chart, and that established that KF must have taken her chart from Dr. Breitman's clinic. There was, according to respondent's counsel, no other source for this information. Respondent's counsel argued there was no violation of any standard of care in not reconstructing the chart since the UCSD hospital and physicians had all of the critical information and since there was no patient harm. With regard to Dr. Breitman's treatment of KF, respondent's counsel observed that neither of complaint's experts was familiar with IPT and that there was no evidence that diagnostic testing and glucose readings were not obtained in a proper and reasonable fashion. Counsel argued that the Website today is the result of Dr. Breitman's having gone through the hearing, consultation with counsel, and a review of the Website with Dr. Linchitz. The fact that Dr. Breitman changed his Website established that Dr. Breitman was contrite and capable of professional conduct.

Respondent's counsel argued that this was a one patient case, that negligence was not established, that Dr. Breitman had tempered his advocacy, that the Website was modified, and that public protection did not require any discipline to be imposed beyond a public reprimand. A public reprimand was appropriate only because it took Dr. Breitman so long to modify his Website.

Evaluation

76. The purpose of the Medical Practice Act is to assure the high quality of medical practice in California. The disciplinary process operates by eliminating immoral and incompetent practitioners from the roster of state-licensed professionals, and by providing unsafe practitioners with an opportunity for rehabilitation where the underlying problems arise out of a lack of education or another correctable deficiency that can be monitored or guarded against during the period of remediation.

If this case were simply about Dr. Breitman's treatment of KF without first obtaining appropriate diagnostic testing, an outright revocation might not be warranted. If this case were simply about Dr. Breitman's loss of KF's medical record and his failure to reconstruct that record, an outright revocation might not be warranted. However, when the facts and circumstances surrounding these acts of negligence, and Dr. Breitman's unbelievable explanations for these negligent acts, are considered with the untrue and misleading

representations that were contained in Dr. Breitman's Website, his disingenuous attempts to explain to Medical Board representatives why the Website was accurate, his maintaining of the Website for more than a year knowing that it contained false and misleading information, a disturbing pattern of deception and dishonesty emerges.

Dr. Breitman is either unwilling or incapable of taking appropriate corrective action until he is forced to do so. He did not cooperate in the production of medical records or the recreation of those medical records, and he did not correct the misinformation contained in his Website until the last possible moment. Dr. Breitman ignored evidence and shaded the truth when he believed that doing so was in his interest. He did not take responsibility for his own misconduct. He blamed others. He was dishonest. Dr. Breitman's unsupported belief in his clinical skills and his self-righteous attitude puts patients at risk. He would not be a good risk if he were placed on probation.

The only measure of discipline that will protect the public is the outright revocation of Dr. Breitman's certificate. This measure of discipline is consistent with the Medical Board's disciplinary guidelines.

Jurisdictional Matters

77. On January 7, 2011, the Executive Director of the Medical Board of California signed the Accusation in Case No. 10-2008-189611. The accusation was served on Dr. Breitman, who timely filed a Notice of Defense.

On February 27, 2012, the record in this disciplinary proceeding was opened; jurisdictional documents were presented; and opening statements were given. On February 27, 28, and 29, 2012, and on March 1 and 23, 2012, sworn testimony was given and documentary evidence was received. On March 23, 2012, closing arguments were given; the record was closed; and the matter was submitted.

LEGAL CONCLUSIONS

The Standard of Proof

1. The standard of proof in an administrative action seeking to suspend or revoke a physician's certificate is clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The requirement to produce clear and convincing evidence is a heavy burden, far in excess of the preponderance of evidence standard that is sufficient in most civil litigation. Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.)

Purpose of Physician Discipline

2. The purpose of the Medical Practice Act is to assure the high quality of medical practice. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 574.) Disciplinary proceedings protect the public from incompetent practitioners by eliminating those individuals from the roster of state-licensed professionals. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.) Conduct forming a basis for a revocation or a suspension must demonstrate an unfitness to practice. (*Watson v. Superior Court* (2009) 176 Cal.App.4th 1407, 1416.)

The Imposition of Physician Discipline

3. Business and Professions Code section 2227 provides in part:

> A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel . . . . and who is found guilty . . . . may, in accordance with the provisions of this chapter:
>
> (1) Have his or her license revoked upon order of the board.
>
> (2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.
>
> (3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.
>
> (4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.
>
> (5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper . . . .

4. Business and Professions Code section 2229 provides in part:

> (a) Protection of the public shall be the highest priority for the Division of Medical Quality . . . . and administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority.
>
> (b) In exercising his or her disciplinary authority an administrative law judge of the Medical Quality Hearing Panel, the division . . . . shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons,

restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence.

(c) It is the intent of the Legislature that the division . . . . and the enforcement program shall seek out those licensees who have demonstrated deficiencies in competency and then take those actions as are indicated, with priority given to those measures, including further education, restrictions from practice, or other means, that will remove those deficiencies. Where rehabilitation and protection are inconsistent, protection shall be paramount.

Applicable Disciplinary Statutes

5. Business and Professions Code section 2234 provides in part:

The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

[¶] . . . [¶]

(b) Gross negligence.

(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care. . . .

[¶] . . . [¶]

(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon. . . .

6. Business and Professions Code section 2266 provides:

The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct.

7. Business and Professions Code section 2271 provides:

Any advertising in violation of Section 17500, relating to false or misleading advertising, constitutes unprofessional conduct.

Negligence and the Standard of Care

8. Medical providers must exercise that degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under similar circumstances. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122.)

Because the standard of care is a matter peculiarly within the knowledge of experts, expert testimony is required to prove or disprove that a medical practitioner performed in accordance with the standard of care unless negligence is obvious to a layperson. Expert testimony must be based on such matters as may be reasonably relied upon by an expert in forming an opinion. With regard to a standard of care derived from a professional practice, the induction of a rule from practice necessarily requires the production of evidence of an ascertainable practice. (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.)

With respect to alternative treatment, some ordinary medical standards apply to the extent required for competent practice within the medical community. (See, *Schiff v. Prados* (2001) 92 Cal.App.4th 692, 701; see, also, *Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1359-1360.) Where allegations of negligence concern matters within the knowledge and observation of every physician and are not relevant to a special course of treatment that must be tested by the teachings and doctrines of a particular school, the testimony of a non-specialist physician can aid the trier of fact in its search for the truth. (*Miller v. Silver* (1986) 181 Cal.App.3d 652, 661 [a psychiatrist was allowed to testify about the standard of care appropriate for the administration of antibiotic therapy by a plastic surgeon because appropriate antibiotic therapy was within the common knowledge of every physician and surgeon by virtue of his or her medical education and internship training, and because any perceived problems with qualifications could be brought out on cross-examination at trial].)

Ordinary or simple negligence – an unintentional tort – consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm. "Gross negligence" long has been defined in California and other jurisdictions as either a "want of even scant care" or "an extreme departure from the ordinary standard of conduct." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 753-754.)

General Unprofessional Conduct

9. Business and Professions Code section 2234 provides that "(u)nprofessional conduct includes, but is not limited to" certain enumerated conduct. This statutory language does not mean, however, that an overly broad connotation should be given the term "unprofessional conduct." The term must relate to conduct which indicates an unfitness to practice medicine. Unprofessional conduct is conduct that breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 575,)

False Advertising

10. Business and Professions Code section 17500 provides in part:

> It is unlawful for any person . . . . with intent directly or indirectly . . . . to perform services, professional or otherwise . . . . to make or disseminate or cause to be made or disseminated before the public in this state . . . . by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning . . . . those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . .

11. Even though Business and Professions Code section 17500 is a criminal statute, it falls within the category of offenses known as public welfare offenses which do not require criminal intent. Business and Professions Code sections 17500 and 2271 can be violated through negligence. (*Khan v. Medical Board* (1993) 12 Cal.App.4th 1834, 1846.)

Under Business and Professions Code section 17500, a statement is false or misleading if members of the public are likely to be deceived. Intent of the disseminator and knowledge of the customer are both irrelevant. The statute affords protection against the probability or likelihood as well as the actuality of deception or confusion. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 875-876.)

Corruption, Fraud and Dishonesty

12. The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage. (Penal Code, § 7.)

The term "dishonesty" seems incapable of exact definition or precise limitation because of the infinite variety of circumstances that affect relationships and affairs of mankind in our society. (*Wayne v. Bureau of Private Investigators and Adjusters, Dept. of Professional and Vocational Standards* (1962) 201 Cal.App.2d 427, 436-437.) "Dishonesty" necessarily includes the element of bad faith, which means fraud, deception, betrayal, faithlessness. The term denotes an absence of integrity. (*Chodur v. Edmonds* (1985) 174 Cal.App.3d 565, 572-573.)

Dishonest conduct may range from the smallest fib to the most flagrant lie. Not every impropriety will constitute immoral or unprofessional conduct, and not every falsehood will constitute "dishonesty" as a ground for discipline. (*Bassett Unified School Dist. v. Commission On Professional Competence* (1988) 201 Cal.App.3d 1444, 1454.)

Alternative Medical Care

13. Business and Professions Code section 2234.1 provides:

> (a) A physician and surgeon shall not be subject to discipline pursuant to subdivision (b), (c), or (d) of Section 2234 solely on the basis that the treatment or advice he or she rendered to a patient is alternative or complementary medicine . . . . if that treatment or advice meets all of the following requirements:
>
> (1) It is provided after informed consent and a good-faith prior examination of the patient, and medical indication exists for the treatment or advice, or it is provided for health or well-being.
>
> (2) It is provided after the physician and surgeon has given the patient information concerning conventional treatment and describing the education, experience, and credentials of the physician and surgeon related to the alternative or complementary medicine that he or she practices.
>
> (3) In the case of alternative or complementary medicine, it does not cause a delay in, or discourage traditional diagnosis of, a condition of the patient.
>
> (4) It does not cause death or serious bodily injury to the patient.

(b) For purposes of this section, "alternative or complementary medicine," means those health care methods of diagnosis, treatment, or healing that are not generally used but that provide a reasonable potential for therapeutic gain in a patient's medical condition that is not outweighed by the risk of the health care method.

(c) Since the National Institute of Medicine has reported that it can take up to 17 years for a new best practice to reach the average physician and surgeon, it is prudent to give attention to new developments not only in general medical care but in the actual treatment of specific diseases, particularly those that are not yet broadly recognized in California.

Cause Exists to Impose Discipline

14. Cause exists under Business and Professions Code section 2234, subdivision (b), to impose discipline. The clear and convincing evidence established that Dr. Breitman engaged in gross negligence in that he commenced IPT with patient KF before obtaining a current lab and maintained a Website that contained false and misleading information.

15. Cause exists under Business and Professions Code section 2234, subdivisions (c), to impose discipline. The clear and convincing evidence established that Dr. Breitman engaged in repeated negligent acts in that he commenced IPT with patient KF before obtaining a current lab, he lost KF's chart and failed to reconstruct it, and he maintained a Website that contained false and misleading information.

16. Cause exists under Business and Professions Code section 2234, subdivision (e), to impose discipline. The clear and convincing evidence established that Dr. Breitman maintained a Website that contained false and misleading information concerning IPT, such as IPT had "virtually no side effects" and was as effective as or better than conventional chemotherapy in treating cancer.

17. Cause exists under Business and Professions Code section 2266 to impose discipline. The clear and convincing evidence established that Dr. Breitman engaged in unprofessional conduct by failing to maintain accurate and adequate medical records in his care of KF.

18. Cause exists under Business and Professions Code section 2271 to impose discipline. The clear and convincing evidence established that Dr. Breitman engaged in advertising of his professional services that violated Business and Professions Code section 17500 in that his advertising, among other matters, represented that IPT had "virtually no side effects" and was as good as or better than conventional chemotherapy in obtaining therapeutic results.

19. Cause exists under Business and Professions Code section 2234 to impose discipline. The clear and convincing evidence established that Dr. Breitman engaged in general unprofessional conduct by advertising of his professional services that was untrue and misleading and violated Business and Professions Code section 17500. His conduct was unethical.

The Appropriate Measure of Discipline

20. Approximately five years ago, Dr. Breitman engaged in gross negligence, repeated acts of negligence, and permitted inadequate and inaccurate medical records to exist. From 2003 until the middle of this disciplinary hearing, Dr. Breitman engaged in dishonesty in connection with his Website, which contained false and misleading information likely to deceive the public related to IPT. Dr. Breitman denied any wrongdoing related to his treatment of KF. He denied any wrongdoing with regard to his Website until less than 30 days ago. His attitude towards the Medical Board has been uncooperative. He is not a good probationary risk. On this record, the only measure of discipline that will protect the public is an outright revocation.

ORDER

Physician's and Surgeon's Certificate No. A 21592 to Les Breitman, M.D., is revoked.

Dated: May 31, 2012

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO January 7 2011
BY ANALYST

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BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **LES BREITMAN, M.D.** **2204 El Camino Real, Suite 104** **Oceanside, CA 92054** **Physician's and Surgeon's Certificate No. A 21592** Respondent.	Case No. 10-2008-189611 A C C U S A T I O N

Complainant alleges:

PARTIES

1. Linda K. Whitney (hereinafter "Complainant") brings this Accusation solely in her official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs.

2. On or about July 1, 1965, the Medical Board of California issued Physician's and Surgeon's Certificate No. A 21592 to LES BREITMAN, M.D. (hereinafter "Respondent"). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on February 29, 2012, unless renewed.

///

JURISDICTION

3. This Accusation is brought before the Medical Board of California (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

4. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, be publicly reprimanded, or have such other action taken in relation to discipline as the Division deems proper.

5. Section 2234 of the Code states:

"The Division of Medical Quality[1] shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5, the Medical Practice Act].

"(b) Gross negligence.

"(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

"(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

"(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a

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[1] California Business and Professions Code section 2002, as amended and effective January 1, 2008, provides that, unless otherwise expressly provided, the term "board" as used in the State Medical Practice Act (Cal. Bus. & Prof. Code, §§2000, et. seq.) means the "Medical Board of California," and references to the "Division of Medical Quality" and "Division of Licensing" in the Act or any other provision of law shall be deemed to refer to the Board.

reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

"...

"(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

"..."

6. Section 2266 of the Code states: "The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct."

7. Section 2271 of the Code states: "Any advertising in violation of Section 17500, relating to false or misleading advertising, constitutes unprofessional conduct."

8. Section 17500 of the Code states:

"It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a

misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine."

9. Unprofessional conduct under California Business and Professions Code section 2234 is conduct which breaches the rules or ethical code of the medical profession, or conduct which is unbecoming to a member in good standing of the medical profession, and which demonstrates an unfitness to practice medicine.[2]

FIRST CAUSE FOR DISCIPLINE

(Gross Negligence)

10. Respondent is subject to disciplinary action under sections 2227 and 2234, as defined in section 2234, subdivision (b), of the Code, in that he was grossly negligent in his care and treatment of patient K.F. The circumstances are set forth below:

11. At all times relevant herein, respondent specialized in providing Insulin Potentiation Therapy (IPT), a form of low dose chemotherapy. On his website, respondent references a "Kinder & Gentler Chemotherapy" and describes IPT as follows:

> "If there is a chemotherapy drug that works against a particular type of tumor, it is believed to work better with IPT. The insulin employed enables the physician to direct all the chemotherapeutic agents to the cancer cells only, bypassing the normal cells and thereby sparing the patient the throes of conventional chemotherapy. Therefore, only approximately 10% of the customary dosage of conventional chemotherapy are required. And as a result of this low dosage, with far less toxicity, up to four different chemotherapeutic agents can be administered at each weekly treatment!"

12. On or about April 9, 2007, patient K.F., a 52 year-old female suffering from metastatic malignant melanoma, presented to respondent for low dose chemotherapy treatment. Respondent provided low dose chemotherapy to patient K.F. on or about April 19, 24, 27 and

[2] *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 575.

May 1, 2007.

13. Prior to beginning chemotherapy, respondent reviewed laboratory testing provided to him by patient K.F. He did not obtain any other comprehensive laboratory testing during his treatment of K.F. While rendering chemotherapy to patient K.F., respondent performed glucose testing only twice per session. The first testing was done prior to the start of the session. The second and final test took place when respondent or his nurse believed the patient has reached the "therapeutic moment."

14. Prior to receiving chemotherapy from respondent on or about April 27 and May 1, 2007, patient K.F. complained to respondent about sores in her mouth and other ailments.

15. Patient K.F. was to return to respondent for further treatment on May 8, 2007, but did not because she was admitted to UCSD Thornton Hospital with a complaint of fever and a white blood cell count of 500[3] with no neutrophils[4] that was associated with malaise, headache, muscle pain, chills, and painful mucositis.[5] During her hospitalization, she received Neupogen,[6] broad spectrum antibiotics and Dilaudid for pain. She also complained of lower extremity paresthesia.[7] While hospitalized, patient K.F. requested her records from respondent; however, he claimed they were missing, failed to provide them and took no steps to reconstruct the missing records.

16. Respondent committed gross negligence in his care and treatment of patient K.F. which included, but was not limited to, the following.

(a) Respondent failed to order any follow up laboratory testing prior to the administration of additional chemotherapy on or about April 24, 27 and May 1, 2007;

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[3] The normal range for WBC count is 4,300 to 10,800 cells per cubic millimeter (cmm)

[4] Neutrophils are the most common type of white blood cell, comprising about 50-70% of all white blood cells.

[5] Mucositis is the inflammation of the mucous membranes lining the digestive tract from the mouth on down to the anus. Mucositis is a common side effect of chemotherapy.

[6] Neupogen is a drug given to patients who have neutropenia (low neutrophil count).

[7] Paresthesia is a sensation of numbness or tingling on the skin.

(b) Respondent failed to perform adequate glucose testing during the administration of chemotherapy on or about April 19, 24, 27 and May 1, 2007;

(c) Respondent treated patient K.F. with chemotherapy on or about April 27 and May 1, 2007, even though she was suffering from mouth sores and other ailments; and

(d) Respondent intentionally mislead patient K.F. and prospective patients that he attracts to his practice via his website containing intentionally vague, misleading or side-effect minimizing information regarding IPT with respect to its use in cancer treatment.

SECOND CAUSE FOR DISCIPLINE

(Repeated Negligent Acts)

17. Respondent has further subjected his Physician's and Surgeon's Certificate No. A 21592 to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (c), of the Code, in that he committed repeated negligent acts in his care and treatment of patient K.F., as more particularly alleged hereinafter:

18. Paragraphs 10 through 16, above, are hereby incorporated by reference and re-alleged as if fully set forth herein.

19. Respondent committed repeated negligent acts, including but not limited, to the following;

(a) Respondent failed to reconstruct or attempt to reconstruct patient K.F.'s missing chart.

(b) Respondent failed to order any follow up laboratory testing prior to the administration of additional chemotherapy on or about April 24, 27 and May 1, 2007;

(c) Respondent failed to perform adequate glucose testing during the administration of chemotherapy on or about April 19, 24, 27 and May 1, 2007;

(d) Respondent treated patient K.F. with chemotherapy on or about April 27 and May 1, 2007, even though she was suffering from mouth sores and other ailments; and

(e) Respondent intentionally mislead patient K.F. and prospective patients that he attracts to his practice via his website containing intentionally vague, misleading or side-effect minimizing information regarding IPT with respect to its use in cancer treatment.

THIRD CAUSE FOR DISCIPLINE

(Failure to Maintain Adequate or Accurate Medical Records)

20. Respondent has further subjected his Physician's and Surgeon's Certificate No. A 21592 to disciplinary action under sections 2227 and 2234, as defined by section 2266, of the Code, in that respondent failed to maintain adequate and accurate records in regards to his care and treatment of patient K.F., as more particularly alleged hereinafter.

21. Paragraphs 10 through 19, above, are hereby incorporated by reference and re-alleged as if fully set forth herein.

FOURTH CAUSE FOR DISCIPLINE

(False Advertising)

22. Respondent has further subjected his Physician's and Surgeon's Certificate No. A 21592 to disciplinary action under sections 2227 and 2234, as defined by section 2271, of the Code, in that he disseminated false and misleading representations through his website, in violation of section 17500 of the Code. The circumstances are set forth below:

23. Paragraphs 10 through 16, above, are hereby incorporated by reference as if fully set forth herein.

24. Respondent's website, at all times relevant herein, stated that, "Is IPT just as effective as the chemotherapy my oncologist would prescribe? It does appear that the percentages for remission and survival are at least as good as with conventional chemotherapy, and probably much better." In fact, this representation is untrue or misleading, lacks substantiation and is based solely on Respondent's personal experience rather than peer reviewed studies or other valid scientific analysis.

25. Respondent's website, at all times relevant herein, stated: "Are there any side effects of IPT treatment? Almost none. There is certainly no hair loss, no going home to shiver in bed for a day or two, and no severe vomiting. There is occasional constipation, which is easily controlled by simple medications. Some nausea is occasionally encountered for a few hours after the first couple of treatments, but this is also easily managed." In fact, this representation is untrue or misleading, lacks substantiation and is inconsistent with Respondent's own observations

including his observation of patients losing clumps of hair.

26. Respondent's website, at all time relevant herein, stated: "As compared to conventional chemotherapy, there are no severe and debilitating side effects. The patient can easily continue with normal daily activities, enjoying a high quality of life while avoiding severe vomiting, hair loss, or fevers." In fact, this representation is untrue or misleading, lacks substantiation and is inconsistent with Respondent's own observations including his observation of patients losing clumps of hair.

27. Respondent's website, at all times relevant herein, stated: "Are there any dangers in IPT treatment? Unlike with conventional chemotherapy, there have been no reported deaths as a result of IPT. In brief, there is no danger. The worst side effect encountered is easily managed constipation. Unlike conventional chemotherapy, anemia and decreased platelet counts are unusual and usually not so severe as to require transfusions." In fact, this representation is untrue or misleading, lacks substantiation, is purportedly based on Respondent's personal experience rather than peer reviewed studies or other valid scientific analysis, and is inconsistent with Respondent's own observations at his practice.

28. Respondent's website, at all times relevant herein, generally misrepresented the benefit of his treatment and the dangers of his treatment.

29. Respondent's website, at all times relevant herein, contained material representations that were represented as fact even though they were not based on fact.

FIFTH CAUSE FOR DISCIPLINE

(Dishonesty or Corruption)

30. Respondent is further subject to disciplinary action under sections 2227 and 2234, as defined in section 2234, subdivision (e), of the Code, in that he committed an act or acts of dishonesty or corruption in connection with his care and treatment of patient K.F. and other patients, as more particularly described hereinafter:

31. Paragraphs 22 through 29 above, which are hereby incorporated by reference as if fully set forth herein.

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SIXTH CAUSE FOR DISCIPLINE

(General Unprofessional Conduct)

32. Respondent has further subjected his Physician's and Surgeon's Certificate No. A 21592 to disciplinary action under sections 2227 and 2234 of the Code in that he has engaged in conduct which breaches the rules or ethical code of the medical profession, or conduct which is unbecoming to a member in good standing of the medical profession, and which demonstrates an unfitness to practice medicine, in his care and treatment of patient K.F. and other patients as more particularly described hereinafter:

33. Paragraphs 22 through 29 above, which are hereby incorporated by reference as if fully set forth herein.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Medical Board of California issue a decision:

1. Revoking or suspending Physician's and Surgeon's Certificate No A 21592, heretofore issued to respondent LES BREITMAN, M.D.;

2. Revoking, suspending or denying approval of respondent LES BREITMAN, M.D.'s authority to supervise physician's assistants, pursuant to section 3527 of the Code;

3. Ordering respondent LES BREITMAN, M.D., if placed on probation, to pay the costs of probation monitoring; and

4 Taking such other and further action as deemed necessary and proper.

DATED: January 7, 2011

LINDA K. WHITNEY
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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